Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *W. S. v. Canada Employment Insurance Commission,* 2017 SSTADEI 375

Tribunal File Number: AD-17-612

BETWEEN:

W. S.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: October 31, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On August 3, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Canada Employment Insurance Commission (Commission) had correctly considered the Applicant's short-term disability benefits as earnings under subsection 35(2) of the *Employment Insurance Regulations* (Regulations) and had correctly allocated those earnings under section 36 of the Regulations.

[2] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on September 5, 2017.

ISSUE

[3] The Member must decide whether the appeal has a reasonable chance of success.

THE LAW

[4] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), an appeal to the Appeal Division may be brought only if leave to appeal is granted and the Appeal Division must either grant or refuse leave to appeal.

[5] According to subsection 58(1) of the DESD Act, the following are the only grounds of appeal:

> **(a)** the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> **(b)** the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> **(c)** the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[6] Subsection 58(2) of the DESD Act provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

SUBMISSIONS

[7] The Applicant cited a number of concerns with the General Division decision. Many of those concerns relate to his belief that he had established the fact that he had been in receipt of short-term disability payments rather than benefits under a wage loss indemnity plan. The Applicant submits that the General Division erred in interpreting these short-term disability payments as earnings for the purpose of subsection 35(2) of the Regulations.

ANALYSIS

[8] The outcome of the General Division appeal is dependent on the nature of the disability benefit that the Applicant received.

[9] The General Division's decision turned on whether the Applicant's sickness or wage loss indemnity plan is a group plan or a private plan, following the criteria of subsection 35(8). Subsection 35(8) applies only once the plan has first been found to be either a sickness or a wage loss indemnity plan. Therefore, the General Division must first determine whether the short term disability payments received by the Applicant were received under either a sickness or a wage loss indemnity plan, which could then be classified as group or private by application of the subsection 35(8) criteria, or whether the payments were received as some other kind of benefit or entitlement.

[10] I have reviewed the file and the reasons for the General Division's decision, and it is not clear to me whether the General Division found that the Applicant received payments under a wage loss indemnity plan, under something analogous to a wage loss indemnity plan, under a sick leave plan benefit, or under something else entirely.

[11] The acronym "WLIP" has at least two reasonable interpretations on the face of the file. It may mean "wage loss indemnity plan" as described and required in subsections 35(2) and 35(8), or it may mean "wage loss insurance payments" per the decision letter of October 3, 2016, whose November 23, 2017, reconsideration was under appeal.

[12] The Applicant had disputed that the difference between a short-term disability and a wage loss *insurance* plan was semantic (GD2-40). The General Division acknowledges that the

Applicant feels that the difference between short-term disability and a WLIP is semantic (paragraphs 30 and 40(f) of the decision), but it does not address the Applicant's concern, or even define what it means when it refers to "WLIP" payments. To add to the confusion, the General Division recites the criteria for inclusion within a Wage Loss Replacement Plan (WLRP), a term taken from the Commission website (paragraph 23). The General Division does not identify whether there is any link between a WLRP and a WLIP.

[13] The General Division accepts that the payments the Applicant received were short-term disability payments but not "WLIP" payments (paragraph 44), yet the General Division applies subsection 35(8), which is relevant only if the plan is first found to be a sickness or a disability wage loss indemnity plan. If the General Division's reference to WLIP at paragraph 44 means that it finds the payments were not "wage loss indemnity payments" for the purpose of subsection 35(2), then it is necessary to know what they were, and on what basis they could be found to be earnings.

[14] The Supreme Court of Canada in *R.E.M.* noted that reasons must be assessed functionally. They must serve to explain the decision to the parties, provide public accountability and permit effective appellate review (*R. v. R.E.M.*, [2008] 3 S.C.R. 3, 2008 SCC 51). The Ontario Court of Appeal considered the sufficiency of reasons in the context of administrative law, stating that—in this context—"[…] reasons must be sufficient to fulfill the purposes required of them, particularly to let the individual whose rights, privileges or interests are affected know why the decision was made and to permit effective judicial review" (*Clifford v. Ontario Municipal Employees Retirement System*, 2009 ONCA 670).

[15] If the Applicant cannot understand what the General Division found in relation to the disability payments he received, he will probably not understand how or why the General Division could reduce the issue to whether the payments were made under a group plan or a private plan, and he will not understand how or why the subsection 35(8) analysis even relates to the decision. This has the potential to impact his ability to appeal or seek judicial review.

[16] It is therefore possible that the General Division may have violated a principle of natural justice by failing to provide adequate reasons per paragraph 58(1)(*a*) of the DESD Act, or that it erred in law per paragraph.58(1)(*b*).

[17] In either case, I find that there is a reasonable chance of success on appeal.

CONCLUSION

[18] The Application is granted.

[19] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Stephen Bergen
Member, Appeal Division